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In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. [redacted]106

MONT B. KISER, LULA KISER,
WINSTON PARROTT and L. S. MONK
Appellants

vs.

CLINCHFIELD COAL CORPORATION
Appellee

On Appeal from the Supreme Court of Appeals of Virginia

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported in Vol. 200, Virginia Reports, p. 517 (Advance Sheets), 106 S.E. (2d) p. 601, (Appendix A, hereof). The opinion of the lower court, from which the appeal was granted, will be found in the printed record of

the Supreme Court of Appeals at page 20, (Appendix B hereof).

Grounds for this Court's Jurisdiction

As shown more fully below, appellee filed its bill in the Circuit Court of Dickenson County, Virginia, pursuant to the general chancery jurisdiction conferred upon that court by Sec. 17-123, of the 1950 edition of the Code of Virginia, to be declared the owner of all the coal and minerals underlying a 117 acre tract of land in said county, and two-fifths of the surface thereof and to enjoin appellants from trespassing thereon. The Circuit Court entered a decree on October 4, 1957 granting the relief prayed; an appeal from said decree was granted by the Supreme Court of Appeals March 7, 1958, which on January 26, 1959, affirmed the decree of the lower court; and a rehearing was refused by said court on March 11, 1959. Notice of an appeal to the Supreme Court of the United States was filed on the 20th day of April 1959 in the Supreme Court of Appeals of Virginia, which is possessed of the record.

One of appellant's defenses drew in question the validity of a statute of Virginia, passed long after the deed under which they claimed had been executed, which rendered the deed void, although admitted to be good before the statute. As the decision of the State Supreme Court of Appeals was in favor of the validity of the statute, and was a final decision of the highest court of the state in which a decision could be had, jurisdiction is conferred on the Su-

preme Court of the United States by U.S.C. Sec. 1257(2); because the statute is repugnant to the Constitution of the United States.

Cases Sustaining the Jurisdiction

The following cases sustain the jurisdiction of this court:

Wood v. *Lovett*, 313 U.S. 362; 84 L. Ed. 1404

Walker v. *Whitehead*, 16 Wall. 314; 21 L. Ed. 375

Green v. *Biddle*, 8 Wheat. 1, 92; 5 L. Ed. 547, 568

McGahey v. *Va.*, 135 U.S. 662; 34 L. Ed. 30, 314

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Aetna Life Ins. Co. v. *Dunken*, 266 U.S. 389; 69 L. Ed. 342, 247

Truax v. *Corrigan*, 257 U.S. 312, 324; 66 L. Ed. 254, 259

The State Statute Involved

The statute in question is the amendment by Act of the Virginia legislature in 1900, shown below in italics, of Section 2465 of the 1887 edition of the Code of Virginia (same as Acts 1877, p. 34, which was the law in 1884).

"Every such contract in writing and every deed con-

veying any such estate or term,[1] and every deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels, and every bill of sale or contract for the sale of goods and chattels when the possession is allowed to remain with the grantor (and any such bill of sale or contract shall be in writing and signed by the vendor) shall be void as to subsequent purchasers for valuable consideration *without notice*, and creditors, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed, or bill of sale may be: *provided, that the possession of any such estate or term, without notice of other evidence of title, shall not be notice to said subsequent purchaser for valuable consideration*". Acts 1899-00, p. 89.

Questions Presented by this Appeal

The two main questions presented by this appeal are:

1. Is the above amendment changing the rule of property prevailing in that state, that possession of real estate was of itself notice of the title of the person in possession, equivalent to that of the registration of the deed conveying same, so that possession was not notice; when construed by the Supreme Court of that state to change the law so

---

[1] The deed required by Virginia Code 1887, Sec. 2413, which provides:

"No estate of inheritance or freehold, or for a term of more than five years, in lands shall be conveyed unless by deed or will." (Same as Code 1873, Tit. 33, Ch. 112, Sec. 1, the law in 1884)

as to deprive an owner of property, acquired sixteen years before the act, with continuous possession of such property after its acquisition, of the benefit of notice by possession forbidden by Article I, Sec. 10 of the Constitution of the United States, or the 14th Amendment thereof, which prohibits any state from passing "any law impairing the obligation of contracts", or, "from depriving any person of life, liberty or property without due process of law"?

2. Does the decision of the state court in this case denying appellants of the benefit of the Virginia Statute providing that:

> "No person shall make an entry on, or bring an action to recover **** any land lying west of the Alleghany Mountains, but within ten years", (Va. Code 1950 Sec. 8-5; Va. Code 1887, Sec. 2915).

deny appellants of the due process and equal protection of the law guaranteed them by the 14th Amendment to the Constitution of the United States, where the evidence shows they have held more than fifty years of peaceable, uninterrupted, exclusive, adverse possession of the surface of the lands in controversy, and the courts of that state fails to adjudicate they are the owners, and allows another to recover same?

The Two Titles Involved

It will below appear appellee's claim to the coal and minerals, and that to the surface rests upon different grounds. In order to conduce to clarity they will be separately noticed.

I.

THE TITLE TO THE COAL AND MINERALS

In the year 1884 James M. Kiser, then the owner of a tract of land of more than 1400 acres, conveyed to one of his sons, Schofield, the grantor of appellants, Mont B. Kiser and Lula Kiser, 117 acres thereof by deed in fee simple without any coal or mineral exceptions. This deed unquestionably conveyed the title to the land, but was void as to subsequent purchasers for value *without notice* until recorded. However, under the Virginia law, at that time, if Schofield took and held possession that was "the same in effect" as notice, by recordation. "Possession of land takes the place of recordation of the instrument", *Chapman* v. *Chapman*, 91 Va. 397, 401; 21 S. E. 813; 50 A.S.R. 846. This actual possession need not be continuous and unbroken. Id.

Schofield did not have his deed recorded but immediately went into actual possession thereof, and continued such possession claiming the same until 1943 when he conveyed the same to appellants, Mont B. Kiser and Lula Kiser, who have continued said possession to this day; but in 1891 he reconveyed the surface to his father and mother, "with the exceptions of coal and minerals and certain timber". In the meantime, in 1887 James M. Kiser and other sons to whom he had also made similar deeds, executed a deed conveying to Tazewell Coal and Iron Company all the coal, minerals, metals and fluids underlying the entire tract of more than 1400 acres of land, without any exception or mention of the 117 acres previously sold to Schofield, which deed for coal and minerals was properly acknowledged and recorded the next year. In 1900 the Virginia legislature amended the recording act as set forth above, changing the

law then in force in that state, that possession by an owner of property was notice equal to that of registration, to a subsequent purchaser thereof, *so that possession was not notice.* In 1902, Tazewell Coal and Iron Company conveyed its purchase from James M. Kiser and sons to William Patrick and L. C. Ware, and from them it passed by mesne conveyances to appellee, Clinchfield Coal Corporation, in 1907, which both of the Virginia Courts held was a purchaser for value. James M. Kiser died in 1904, but he became insane and a committee was appointed for him prior to 1896 (exact date not shown) and his wife died in 1900.

Appellants, Mont B. Kiser and wife, leased the coal underlying the 117 acres of land to appellants, Monk and Parrott, who began to mine same in 1951. When the mining began, this suit was instituted by Clinchfield Coal Corporation, alleging it was the owner of a two-fifths interest in the surface and all the coal and minerals underlying this 117-acre tract of land, setting forth its chain of title, and the claim of appellants was void; and Monk and Parrott were mining coal therefrom, and prayed a decree declaring it to be the owner of all the said coal and minerals and a two-fifths interest in the surface, and for an injunction, which was granted.

The Federal question is: Did the Act of the Virginia legislature in 1900, as construed by the Virginia courts, depriving Schofield Kiser of the benefit of notice by possession contravene the Constitution of the United States? Both the Circuit Court and the Supreme Court of Appeals held that Tazewell Coal and Iron Company, which purchased exactly as appellee, by reason of Schofield's possession, was a purchaser with notice, and got nothing. The Supreme Court of Appeals said, 200 Va., p. 521-22:

"Thus at the time of the conveyance of 1887 of the mineral estate by James M. Kiser and wife to Tazewell Company, Schofield was in possession of the surface of the land, and under the common law rule stated in Chapman v. Chapman, 91 Va. 397; 21 S. E. 813, his possession was sufficient to charge Tazewell with notice of Schofield Kiser's deed. However, by statute enacted by the General Assembly of January 15, 1900, the common law rule was abrogated by adding a proviso to the recording statute (Acts of Assembly 1899-1900, p. 89) to the effect that mere possession shall not be notice to subsequent purchasers for valuable consideration. Norfolk & P. Traction Co. v. White, 113 Va. 102; 73 S. E. 467; Code of 1950, Sec. 55-96. This was the law in effect on August 7, 1902, when Tazewell Coal and Iron Company executed two deeds to the land in question, one conveying to William Patrick an undivided three-fourths interest in the mineral estate, and the other conveying to L. C. Ware an undivided one-fourth interest in the mineral estate.

"Thereafter, by mesne conveyances, the mineral estate passed to Clinchfield, at which time the proviso that mere possession shall not be notice to subsequent purchasers for valuable consideration was in effect. *Thus, this proviso applied to all purchasers of the mineral estate since the enactment of the statute abrogating the rule in the Chapman case, and mere possession by Schofield or Mont Kiser since the effective date of the statute constituted no notice of Schofield's deed.*" (Emphasis ours)

The opinion of the Circuit Court was in almost the same words. See "Appendix B" hereof.

We contend:

(1) The laws which existed at the time and place the deed to Schofield was made fixed the rights of the parties thereto, entered into and formed a part of it, as if they were expressly incorporated in its terms, and continues with the same force and effect including its remedies for enforcement, after the amendment by the legislature. *Wood* v. *Lovett*, 313 U.S. 362; 85 L. Ed. 1404; *Walker* v. *Whitehead*, 16 Wall. 314; 21 L. Ed. 375; *Hoffman* v. *Quincy*, 4 Wall. 535; 13 L. Ed. 403; *Green* v. *Biddle*, 8 Wheat. 1, 92; 5 L. Ed. 547, 568; *Fletcher* v. *Peck*, 6 Cranch 87, 137; 3 L. Ed. 162, 178.

(2) No state can change the law impairing rights to any extent after they are vested, or which imposes conditions, dispenses with or adds others, or changes or deprives a party of what he is entitled to at the time of vesting. Id.

(3) No state can make or pass any law which diminishes vested rights in *any degree*, or adds to or diminishes the means of enforcement after they have become vested. Id.; *Barnitz* v. *Beverly*, 163 U. S. 113; 41 L. Ed. 93; *Campbell* v. *Holt*, 115 U. S. 620; 29 L. Ed. 483.

(4) The effect of a deed is impaired by any law which derogates from its substantial effect or measures his rights thereunder. *Home B. & L. Ass.* v. *Blaisdell*, 290 U. S. 398, 431; 78 L. Ed. 413, 425.

(5) The Act of 1900 (Acts 1899-00, p. 89), as construed by the Virginia Courts directly takes from Schofield Kiser the right to rely upon his possession under his deed as notice and is arbitrary; and a title, admittedly good

before according to every legal test, was destroyed. The essence of due process is the protection of the individual and his property from arbitrary action, *Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U. S. 392; 81 L. Ed. 1093, 1100.

James M. Kiser had become incapacitated to acknowledge the deed in 1900, and the act when construed retrospectively deprived Schofield of his property which was unassailable, but for this act of the legislature. The necessary effect of the act, as construed and applied by the Virginia Courts was to deprive appellants of a defense that both Virginia courts held was good before the enactment. This act deprived appellants of a vested property right fixed by law then in force, and under which the property had been held for sixteen years, by subsequent legislation. *Etter v. Thomas*, 228 U.S. 148, 156; 53 L. Ed. 773, 778. As said by Mr. Justice Sutherland in *Coombes v. Getz*, 285 U. S. 434, 448; 76 L. Ed. 866, 878:

> "A contractural obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, Clause 10, and the due process of law clause in the 14th Amendment of the Federal Constitution."

The Stage and Manner the Question was Raised, and the Manner it was Disposed by the State Court

When appellee filed its bill in the circuit court (R. 2-11) alleging it was the owner of the coal and minerals and set out its chain of conveyances from James M. Kiser, and that appellants, Mont B. Kiser and Lula Kiser, were claiming this same property adversely by reason of the deed from James M. Kiser to Schofield in 1884, under which they

claim, but did not allege any of the grantors in its chain of title was in possession at the time of the respective purchases, as the law requires, if they claim as innocent purchasers for value (Story's Eq. Pl., Sec. 805 (4 Ed.), p. 802; Dan Ch. Pr. (5th Am. Ed.), p. 637), appellants demurred (R. 11), which was later overruled (R. 18); and according to the Virginia practice answered the bill denying appellee's ownership thereof. They also alleged that, by parol, James M. Kiser gave this land to his son, Schofield, who pursuant thereto took possession, built a house, barn, crib and other buildings, fenced, cleared, planted an orchard thereon, and cultivated it until the deed dated in 1884 was made; and thereafter continued his possession of the 117 acres in question "claiming title thereto to the bounds thereof and to everything thereunder, until he conveyed the same to respondants, Mont B. Kiser and Lula Kiser, on October 26, 1943, who continued in like possession of the entire tract of 117 acres of land until the institution of this suit *** and are the complete owners of the said 117 acres of land embraced in said deed *** These respondents further aver that complainant and its predecessors in title took their deeds which embrace these respondents' tract of land, knowing Schofield Kiser had a valid deed therefor, was in possession thereof, claiming under his deed to same" (answer of Appellants, p. 14-15).

In oral argument, in the trial court, appellants contended the act would be unconstitutional if applied as the court did; in a brief (pp. 41-44), in that court, they argued said act of the legislature of 1900 was powerless to effect Schofield's rights which were vested and quoted from Mr. Justice Story's opinion while on circuit. In their petition for an appeal they reiterated the argument (pp. 52, 55); and, also in their brief in the Supreme Court of Appeals

(pp. 80, 85); and the answer of both courts are stated above.

They again, in a petition for a rehearing, made the same argument (pp. 8-11), and this was refused without comment. Thus we have from the beginning insisted on this right secured them by the provisions of the Constitution of the United States, forbidding a state from passing any law impairing the obligation of contracts, or depriving a person of property without due process of law.

The Question is Substantial

The law then existing was a part of the contract or grant, by which this indefeasible absolute title had become vested, and subsequent legislation cannot divest or impair its indefeasible aspect. What is the value of the constitutional sanction, if property of an individual, fairly and honestly acquired and surrounded by all the sanctity the law can afford, can be divested or impaired by subsequent legislation against which such honest owner is powerless to safeguard? The act of transferring property of an individual is not one of legislation and is thus beyond the legislative power. It is that of an arbitrary edict forbidden by due process of law, and safeguarded by the 14th Amendment to the United States Constitution, *Slochower* v. *Board of Education*, 350 U.S. 551, 559; 100 L. Ed. 692, 701.

Aside from the arbitrary procedure, of taking appellants' valuable property and leaving them practically destitute, the fact that the Virginia courts have so construed the act of that State's legislature as to take the property of appellants from them contrary to the sanctions surrounding it by the law of that state when it was acquired, shows

that the safeguards thrown around it by the Federal Constitution in prohibiting a state from passing any law impairing the obligation of contracts or denying any person of their property without due process of law, may be more difficult in its application than at first blush appears, and makes further amplification necessary, so that principles sacred enough to be imbedded in our fundamental law imperatively calls for diligent scrutiny to the end that rights so protected be not left unredressed. A strict observance of such rights calls for vigilant enforcement against such substantial and essential infraction. Illegitimate and unconstitutional practices gain their footing by silent approaches and slight deviations from strict observances. Such subversions are not only illegitimate, but are fraught with actual danger, having begun in condoning things because slight, they will continue on the score of expediency, and finally be overlooked as a matter of course. To withhold the remedy is to deny the right. The greatest danger to our Constitution lies in insidious encroachments of men of zeal, well meaning, but without foreseeing the consequences. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and to protect them against any stealthy encroachments thereon. The motto should ever be *obsta principiis*. Accordingly, for the reasons stated, the questions presented are vital and constitutional.

Conclusion

To summarize under this head: As the Virginia law was in 1884, when Schofield Kiser obtained his deed to this land, it conveyed to him unquestionable title against James M. Kiser, and subsequent purchasers from and through him with notice. Schofield had two methods of giving notice

to all such purchasers: (1) recording his deed according to the laws of that state, or (2) by going into possession. "Possession of land takes the place of recordation of the instrument of title", *Chapman* v. *Chapman*, Supra. He took and continued possession. That law entered into and was part of the obligation of the executed contract; and its impairment by the State in any degree is forbidden, either by its legislature or its courts, *Planters Bank* v. *Sharp*, 6 How. 301, 327; 12 L. Ed. 447, 458.

II.

APPELLANTS WERE DENIED DUE PROCESS AS TO THE SURFACE

After the conveyance by Schofield to his father and mother in 1891, they conveyed to him an adjoining tract described as containing 207 acres in 1894. Thereafter in a creditor's suit against Schofield and his father all the lands they both owned were sold, and Schofield bid in the 117 acre tract at that sale, and continued his possession thereof. He failed to pay his bid, and the sale of 125 acres, part of his 207 acre tract, was set aside; whereupon the Special Commissioner who conducted the sale, in a new suit for the purpose of collecting this unpaid purchase sold 117 acres of the 207 acre tract conveyed to Schofield in 1894, and both courts held it was conveyed to Nancy Kiser, Schofield's wife, in 1903. Nancy Kiser died in 1905 leaving five children as her heirs, and appellee obtained deeds from two of them. This is the grounds of the claim by appellee to the surface.

That appellants and those under whom they claim have been in actual possession of the 117 acre tract of land for

almost three quarters of century is not disputed. The only act by Schofield *not adverse to the world* is the conveyance to his father and mother in December 1891. The Supreme Court of Appeals in its opinion does not consider this question, although argued at the outset, and again in the petition to rehear. The Circuit Court with reference to this says: "Thereafter Schofield's possession of the surface could not be considered as being adverse to his own deed, in which he conveyed away all claim of title to the surface, unless he thereafter received some color of title back to him. His own occupancy is not enough. He is not allowed to claim adversely to his own deed" (R. 31-2).

The learned Circuit Court cites three Virginia cases to sustain its decision. An examination of these show they do not sustain its contention. They only held, what is well settled, that such holding is presumed to be in subserviency; but, when there is *"a clear, positive, and continued disclaimer and disavowal of such relation, and the assertion of an adverse right, brought home to the knowledge of the true owner"*, it becomes adverse; as was later held by the Supreme Court of that state, in the case of *Creekmur* v. *Creekmur*, 75 Va. 430, 436-7, where a father continued his possession after a conveyance to his son, and thus became the owner thereof.

As both courts found that Schofield Kiser (nicknamed Tug) was in, and held possession before 1887 we will not notice the evidence of possession before that time except to connect it. It was conceded that he was married in 1888. S. C. Hammon (R. 46-7) after showing his familarity, said:

"Q. After Tug married where did he live?
"A. Right here at that time.

"Q. Did you ever hear him claim the place?

"A. Yes, I heard him claim the place.

"Q. After Tug moved in there, did he continue to farm it?

"A. Yes, he farmed it."

Charlie Phillips (R. 55-6)

"Q. After Tug come here what has been done toward the farming of the land?

"A. Oh, a whole lot, he has cleared up and fenced, and I helped farm, helped him and his wife hoe corn back over there. I remember that well.

"Q. Has there been any year it has not been farmed since he was married or since Tug lived here, has it been farmed every year?

"A. Yes, sir, every year I can remember of.

*****

"Q. Did you ever hear him say who this land belonged to?

"A. Sure, he said it belonged to him.

"Q. Did you ever hear since you can remember Tug living here of anybody else claiming it?

"A. I never did hear of it or anybody fencing it or anything.

"Q. Where was Tug when you heard him claiming the land, was he on this or away from here?

"A. He was here and I was here working.

"Q. Has he ever had any orchard on this farm?

"A. Yes, sir, he had some orchard.

"Q. Did you say that after Tug got married he lived here all the time after that, from then on?

"A. I never knowed him being moved away." (R. 61-2).

John Hicks (R. 64-5—born 1885 and lived nearby)

"Q. When you can first remember this place was there any clearing much?

"A. There wasn't any big lot.

"Q. Since that time what has been done?

"A. Well, there has been a whole lot cleared.

"Q. Has it been fenced?

"A. Yes, sir.

"Q. Does the public road run through this farm?

"A. Yes, I suppose it does, I suppose.

"Q. How close does it go to the dwelling house, the public road?

******.

"A. I never noticed to get down to the footage of it, but it ain't fur, just a short distance from the house to the road.

"Q. You say Tug lived there the first you remember?

"A. I remember them talking about a fellow Nooncaster. I was a kid then, but Tug was the one I remember of being on it myself.

"Q. Since that time how much has Tug lived on it since you can remember?

"A. Well, it has been up in fifty years, me and my daddy cut and split rails over here and fenced a big field back over here.

"Q. Who did you do that for?

"A. Tug Kiser.

"Q. Has that field been cultivated and farmed since?

"A. Yes, sir, it has.

******

"Q. Did you ever hear Tug say anything about who owned the place?

"A. Yes, sir. Tug owned the place. I have heard him say many a time "my farm".

"Q. Where would that be?

"A. Maybe here or working over in the field.

"Q. Did you ever hear of anybody else claiming the place you can remember except Tug?

"A. No, sir. I sure didn't."

James Cheek (R. 69) after stating he was at this place in 1903, and speaking of Tug Kiser, said:

"Q. Do you know who claimed the place?

"A. He claimed it himself."

Henry Powers (R. 73)

"A. Tug lived there after Dick was the only man I knowed of living there and he lived there sixty some years and raised his family there.

"Q. Did he farm here while he was living out there?

"A. Yes, Tug farmed, he had to if he raised a family.

"Q. And has it been cultivated since that time?

"A. Oh, yes, it has been cultivated and Mont has cultivated same.

******

"Q. Did I understand you to say since Tug got married he lived here until he died?

"A. He lived here from the time I first knew him here, from that on 'till he died, that is he lived on the place here and raised his family. He lived here sixty some years. I don't know exactly." (R. 75).

Margaret Kiser (R. 79)

"Q. After Tug got married did you ever go out there and work any?

"A. Yes, I was out there frequently and worked a day or two for him and hoed corn.

"Q. Who claimed the place then?

"A. Tug. I never knowed nothing else but it being his and never thought of nothing else."

Paris Kiser (R. 82) speaking of Tug

"Q. From the time he got married and moved there do you know who claimed the place where he lived?

"A. He claimed it himself.

"Q. Have you heard him claim that?

"A. I reckon I have.

"Q. What did you see him doing on the place?

"A. I saw him working on it, clearing it, and fencing.

"Q. Did he do that continuously?

"A. Yes, sir, all the time I knowed him.

"Q. Did he say he owned the land there?

"A. He claimed he did. He claimed he never signed it away was what he always claimed to me."

Appellant Mont B. Kiser (Born 1892, R. 88)

"Q. When you can first remember, where were you living?

"A. Where I now live, on the same farm.

"Q. Who was claiming the place when you can first remember?

"A. My father.

"Q. Did you ever hear him say after that who owned it?

"A. Yes, sir.

"Q. Did you ever hear that anybody else claimed it?

"A. Never did. No one else ever claimed it.

******

"Q. Did you ever hear him make that claim more than once, that he owned that place and the coal?

"A. I guess I would say a hundred times and would not miss it far."

Moscow Lambert (R. 136)

Witness was the land agent for the predecessors of Appellee which was formed in 1906, and continued as such, it being part of his duties to look after the recordation of

deeds and to see after trespasses, for nearly forty years, testified, on cross-examination:

"Q. I also understand you to say that you had discussed with Schofield Kiser about this 117 acre tract of land he lived on, is that correct?

"A. I did.

"Q. Where did you discuss with him about that?

"A. Well for a good while I was interested in trying to work out a purchase, in other words trying to get an option to purchase the whole interest.

"Q. Was that the mineral interest or surface interest?

"A. That was the surface."

There is much other evidence of this possession of the surface, and nothing to the contrary; and the evidence of Lambert, the company's agent, shows the assertion of this adverse claim was brought home to appellee, to the extent it endeavored to purchase same. Afterward this agent saw the acts of ownership on numerous times. In addition, when the valuable timber was cut from the land in 1937 by Schofield, appellee knew of it and discussed with his son this assertion of an adverse right; and any part of purchase price was refused it. Mr. Rush, who succeeded Lambert, discussed this with appellee's vice-president and general superintendent and its legal department, and also Schofield specifically claimed this in a suit, in which appellee was a party, brought in 1916; notwithstanding this it never even claimed any rent (R. 112, 169). In order for actual possession to be adverse, it is not necessary that the party in possession should expressly declare his intention

to hold it as his own, although in this case he did so in court, and out of court, to appellee's knowledge.

> "The actual occupation, use and improvement of the premises by the claimant, as if he were in fact the owner thereof, without payment of rent, or recognition of title in another, or disavowal of title in himself, will be sufficient to raise a presumption of his entry and holding as adverse owner." 1 Am. Jur., Sec. 189, pp. 897-8; approved in *Marion Investment Co.* v. *Va. Lincoln Fur. Co.*, 171 Va. 170, 182.

Adverse possession of land for the statutory period (10 years, Va. Code 1950, Sec. 8-5), not only bars the remedy, but confers a good and perfect title in such party in possession as will enable him to recover it from another, *McClanahan* v. *N. W. Ry. Co.*, 122 Va. 705; 90 S. E. 453; *Guaranty Title Co.*, v. *U.S.*, 264 U. S. 200; 68 L. Ed. 630.

How Question Raised in Virginia Courts

Appellants in their pleadings alleged adverse possession, and so contended; but the lower court held, contrary to the decisions it cited, appellants could not claim against the deed of Schofield Kiser in 1891; and the Supreme Court of Appeals did not discuss the question. Appellants had no further opportunity to present the question in these courts.

CONCLUSION

While we recognize that the decision of a state court upon questions of fact, or the application of its own laws

cannot ordinarily be reviewed by this court; yet where a Federal right has been denied as a result of a finding of fact, shown by the evidence not to support it, or a legal claim impaired by its subsequent legislation, or when the conclusions of law and finding of facts are so intermingled as to make it necessary to analyze the facts to determine whether the Federal right has been denied, this court must exercise its independent judgment of the questions. *Detroit United Railway* v. *Michigan*, 242 U.S. 238; 249; 61 L. Ed. 268, 274; *Truax* v. *Corrigan*, 257 U.S. 312, 324; 66 L. Ed. 254, 259; *Aetna Ins. Co.* v. *Dunken*, 266 U.S. 394; 69 L. Ed. 342, 347.

We submit, that the decisions of the State Court contravenes the Constitution of the United States, and should be reversed.

Respectfully submitted,

S. H. SUTHERLAND
Clintwood, Virginia
Counsel for Appellants

S. H. & GEO. C. SUTHERLAND
Clintwood, Va.

APPENDIX A

OPINION—SUPREME COURT OF APPEALS OF VIRGINIA

200 Va. Rep. 517 (Advance Sheets)

Present: All the Justices.

Record No. 4863

MONT B. KISER, ET AL.

-v-

CLINCHFIELD COAL CORPORATION.

OPINION BY JUSTICE KENNON C. WHITTLE

Richmond, Virginia, January 26, 1959

FROM THE CIRCUIT COURT OF DICKENSON COUNTY

F. W. Smith, Judge

On October 26, 1951, Clinchfield Coal Corporation, hereinafter called Clinchfield, filed a bill in chancery against Mont B. Kiser, et al.; alleging title to the coal and minerals underlying a tract of 117 acres of land in Dickenson County, and also claiming title to a two-fifths interest in the surface thereof. The bill further alleged that Mont B.

Kiser and his lessees (appellants here) were mining coal and trespassing upon said land.

Upon the filing of the bill the court entered an order restraining the trespass until the case could be heard on its merits.

Appellants demurred to the bill, and without waiving their demurrer, answered the same. Depositions were taken, and upon a hearing, the circuit court on October 4, 1957, entered a decree overruling the demurrer, adjudging Clinchfield to be the owner of the mineral estate in the 117 acres and a two-fifths interest in the surface. A commissioner was appointed to ascertain the damages resulting from the alleged trespass. From this decree appellants appeal.

The record and briefs are voluminous, and there are some contentions made which we do not deem of sufficient merit to be considered. The material questions for decision are:

I. Did the court err in overruling the demurrer to Clinchfield's bill?

II. Was Clinchfield entitled to have the partition suit styled "Mont B. Kiser v. Clinchfield Coal Corporation, et al.", instituted on the 8th day of January, 1916 and removed from the docket on the 13th day of March, 1935, reinstated on the docket and considered in the instant cause?

III. Was Clinchfield entitled to a decree adjudging it the owner of the mineral estate underlying the 117-acre tract of land?

IV. Was Clinchfield entitled to a decree adjudging it the owner of a two-fifths undivided interest in the surface of the said 117-acre tract?

There is no merit in the point raised in question No. I to the effect that the court erred in overruling the demurrer to the bill. The bill clearly sets forth Clinchfield's position in the suit and apprises appellants of its claim. The pleadings fully point up the issues involved.

The point raised in question No. II developed when Clinchfield filed the instant suit in 1951, wherein it prayed that the partition suit theretofore brought by Mont B. Kiser on January 8, 1916, against his father, Schofield Kiser and Clinchfield, be revived and brought into this suit for the purpose of showing that Mont Kiser in the 1916 suit had taken a position inconsistent with the position taken in the 1951 suit.

In the suit brought in 1916 Mont Kiser claimed an undivided one-fourth interest in the surface of the 117 acres here involved. In its answer Clinchfield asserted then as it now asserts that it owned the mineral estate in the 117 acres and an undivided two-fifths interest in the surface.

Schofield Kiser, in his answer to the 1916 suit, claimed title in fee simple to the entire 117 acres and filed his cross-bill praying that the claims of his son, Mont Kiser, and of Clinchfield, and the deeds under which they based their respective claims, be set aside as constituting a cloud upon Schofield's title.

To this cross-bill Clinchfield filed its answer denying Schofield's claim and reasserted its ownership of the

mineral estate and its undivided two-fifths interest in the surface. It prayed that the deeds under which Schofield Kiser based his claim be set aside and declared a cloud upon Clinchfield's title. Mont Kiser also filed an answer to the cross-bill in which he asserted his ownership of an undivided one-fourth interest in the surface and adopted Clinchfield's answer in the following language:

> "* * * This respondent here adopts as his answer to said cross-bill the answer of Clinchfield * * * [and] asks that each and all of the allegations and statements of the said answer be read and considered as a part of this answer, as freely as if said answer was here copied *in extenso.*"

The issue in the 1916 proceeding, both as to the original bill and the cross-bill, was between Mont Kiser and Clinchfield in agreement on one side, and Schofield Kiser adversely to Mont Kiser and Clinchfield on the other.

Depositions were taken in support of the respective claims and the case remained on the docket until March 13, 1935; at which time, on motion of the complainant, Mont B. Kiser, it was ordered "left" from the docket. The issues in the case had never been submitted for decision.

Mont Kiser's change in position since the first suit was removed from the docket in 1935 is brought about by the fact that on October 26, 1943, his father, Schofield Kiser, executed a deed purporting to convey to Mont and his wife the entire 117 acres in fee simple. Thus he now assumes the position attempted to be maintained by his father, and opposed by him, in the 1916 suit.

When Mont Kiser and his wife undertook to lease the

mineral estate in the 117 acres in 1951, and the lessees undertook to remove coal therefrom, Clinchfield immediately filed the instant suit praying for a decision as to the title to the land and requesting an order restraining the mining operation.

In dealing with the question as to whether or not the 1916 suit should be considered in the instant case, the lower court took the position that Clinchfield's bill was in the nature of a bill of revivor. 1 Hogg on Equity Procedure (Va. and W. Va.), 3rd Ed. pp. 273-276. The 1916 suit was considered by the court as evidence in the present case and for the purpose of showing the flagrantly inconsistent positions sought to be maintained by Mont Kiser. The suit was not treated as a bar or estoppel to Mont Kiser's right to assert his alleged title to the land in question. On the contrary, the court decided the instant case on the evidence as disclosed by the record.

The learned chancellor, in an able opinion filed and made a part of the decree appealed from, stated: "The issues in the original suit were never decided and subsequent to its dismissal pertinent other facts have arisen which are now proper to be taken into consideration. * * *" Thus, the question of whether or not the bill in the 1951 suit should be considered "in the nature of a bill of revivor" becomes immaterial for the reason that the court did not hold that the inconsistent positions taken by Mont Kiser should bar or estop his right to assert his defenses in the instant suit. 19 Am. Jur., Estoppel, § 72, pp. 704-708; *Rohanna* v. *Vazzana*, 196 Va. 549, 553, 84 S. E. 2d 440, 442.

Question No. III challenges Clinchfield's right to the mineral estate in the 117-acre tract. The record discloses that in 1884 the land here involved was a part of a large

tract consisting of some 1400 acres owned in fee simple by James M. Kiser, father of Schofield, which is the common source of title of all parties to this controversy.

On January 31, 1884, James M. Kiser and wife conveyed the 117 acres by deed in fee simple to their son Schofield. There was no exception of the mineral estate. This deed was not recorded until November 30, 1888 and, as hereinafter pointed out, was never acknowledged by James M. Kiser. In the meantime, on December 7, 1887, James M. Kiser and wife, together with certain of their children not here involved, conveyed the mineral estate and certain timber to Tazewell Coal and Iron Company.

The evidence discloses that after the deed of 1884 to Schofield Kiser was executed, he held possession of the surface until December 12, 1891, when he executed a deed for the 117 acres to James M. Kiser and wife, which contained the following exception, "with the exception of the coal and minerals" and certain timber.

Thus, at the time of the conveyance of 1887 of the mineral estate by James M. Kiser and wife to the Tazewell company, Schofield was in possession of the surface of the land, and under the common law rule stated in *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, his possession was sufficient to charge Tazewell with notice of Schofield Kiser's deed. However, by statute enacted by the General Assembly of January 15, 1900, the common law rule was abrogated by adding a proviso to the recording statute (Acts of Assembly 1899-1900, p. 89) to the effect that mere possession shall not be notice to subsequent purchasers for valuable consideration. *Norfolk & P. Traction Co. v. White*, 113 Va. 102, 73 S. E. 467; Code of 1950, § 55-96.

This was the law in effect on August 7, 1902, when Tazewell Coal and Iron Company executed two deeds to the land in question, one conveying to William Patrick an undivided three-fourths interest in the mineral estate, and the other conveying to L. C. Ware an undivided one-fourth interest in the mineral estate.

Thereafter, by mesne conveyances, the mineral estate passed to Clinchfield, at which time the proviso that mere possession shall not be notice to subsequent purchasers for valuable consideration was in effect. Thus, this proviso applied to all purchasers of the mineral estate since the enactment of the statute abrogating the rule in the *Chapman* case, and mere possession by Schofield or Mont Kiser since the effective date of the statute constituted no notice of Schofield's deed.

The record clearly discloses that Clinchfield in good faith, for valuable consideration, purchased in 1907 the mineral estate embraced in the deed from James M. Kiser to Tazewell, relying upon said deed and the recorded chain of title by subsequent conveyances from Tazewell and its successors in title. Therefore, if Clinchfield so purchased without notice of Schofield Kiser's deed, then Schofield's deed was and is void as to Clinchfield's deed of purchase.

Further, the record discloses that the only certificate of acknowledgment, or any other proof of execution of the deed by James M. Kiser to Schofield Kiser on January 31, 1884, appears to be a certificate of Jessie Wampler, a notary public, certifying the privy examination and acknowledgment of Elizabeth Kiser, wife of the grantor. Nowhere is it shown that James M. Kiser acknowledged the deed; therefore the deed was not duly admitted to

record as to him. §§ 2500, 2501, Code, 1887; now §§ 55-106 and 55-113, Code, 1950.

It is argued by counsel for appellants that the attorney for Clinchfield who examined the title to the mineral estate prior to purchase must have had actual notice of Schofield's deed. It will be remembered that the deed from James M. Kiser to Schofield was not filed for recordation until after the conveyance of the coal and minerals by the deed from James M. Kiser to Tazewell, and an attorney examining the record as to the title to the mineral estate would not be called upon to look for the recordation of adverse conveyances in the name of James M. Kiser subsequent to the date of the recordation of the duly acknowledged deed from James M. Kiser to the Tazewell Coal and Iron Company. The deed to Schofield Kiser was not recorded until four years and ten months after its execution, and ten months after the recordation of the deed to the Tazewell company. See *Bowman* v. *Holland*, 116 Va. 805, 83 S. E. 393.

In order for a deed and its recitals to operate as constructive notice to a *bona fide* purchaser of land it must be a link in the purchaser's chain of title. No purchaser is chargeable with constructive notice of all matters of record but only with such as the title deeds of the estate refer to or put him on inquiry about. *Lewis* v. *Barnhart*, 145 U. S. 56, 12 S. Ct. 772, 36 L. ed. 621; *Flanary* v. *Kane*, 102 Va. 547, 46 S. E. 312.

It was not incumbent upon Clinchfield's attorney to search the record for adverse conveyances by James M. Kiser recorded after the recordation of the Tazewell Coal and Iron Company's deed.

Appellants further contend that even if Mont Kiser's

paper title to the mineral estate is not good as against Clinchfield, he has title to the same by adverse possession by reason of Schofield's possession. This is not true under the circumstances here involved. After the severance of the surface estate from the mineral estate, color of title to the mineral estate alone and possession of the surface estate not held adversely, is not sufficient. Mont Kiser has shown no occupancy or use of any part of the mineral estate such as would constitute actual possession, and there is no merit in this contention. *Loncey Clevinger* v. *Bull Creek Coal Co., Inc.*, 199 Va. 216, 219, 220, 98 S. E. 2d 670, 672, 673; 58 C.J.S., Mines and Minerals, § 157, page 329.

The record title exhibited by Clinchfield shows that it has a good recorded paper title to the mineral estate which was conveyed by the deed of December 7, 1887 from James M. Kiser to Tazewell Coal and Iron Company, and the evidence shows that it has exercised acts of exclusive ownership over the same and is therefore the owner of the mineral estate in the 117 acres in controversy.

Regarding question No. IV which involves Clinchfield's ownership of a two-fifths undivided interest in the surface of the 117-acre tract, it will be remembered that Schofield Kiser reconveyed the surface to his father, James M. Kiser, by deed of December 12, 1891. Thus, at that time, the title to the surface was left in James M. Kiser.

General creditors' suits were later instituted against James M. Kiser and Schofield Kiser in which all the lands of James M. Kiser were sold except 109 acres known as the home tract. Schofield Kiser bid in the 117-acre tract. Upon his failure to pay the purchase price a resale was ordered by the court, at which resale the 117-acre tract was bid in by John F. Trivett. The decree of the court dated June 15,

1902, shows that John F. Trivett assigned his purchase to Schofield Kiser, and directed the special commissioner to convey the 117 acres to Schofield, and the cause was then stricken from the docket without the deed to Schofield having been made.

On February 9, 1903, another decree was entered in the then stricken cause. In this decree it was set out that Schofield Kiser had assigned his purchase to his wife, Nancy Kiser, and J. K. Damron was appointed special commissioner for the purpose of conveying the land to Nancy Kiser. This was done, and the conveyance was recorded as having been so made.

It is disclosed that the scrivener first wrote the deed to Schofield Kiser and later Schofield's name was stricken and Nancy's written in its place. Mont Kiser now contends that the deed could not have been changed so as to divest Schofield of his title. There is no merit in this contention. It nowhere appears that the deed was ever delivered to Schofield Kiser and accepted by him, and therefore it is not shown that title ever vested in Schofield. The certificate of acknowledgment by Damron, special commissioner, is dated the 9th day of February, 1903, which is the date of the deed and which is also the date of the decree directing the deed to be made to Nancy Kiser. Further, the evidence shows without contradiction, and in fact it is asserted by Mont Kiser in his brief, that Schofield had the deed changed from himself to Nancy Kiser in order to avoid the collection of a fine against Schofield for the illegal manufacture of whiskey. Thus it is elementary that the principle of estoppel would apply to Schofield or anyone claiming by,

through or under him. *Davis* v. *Brown*, 94 U. S. 423, 426, 24 L. ed. 204.

And further, the record shows unequivocally that Nancy Kiser had been recognized by all parties concerned to be the owner of the surface of the 117 acres. Therefore, Mont Kiser, insofar as he claims title under Schofield, cannot claim that the change in the deed to Nancy Kiser was illegal.

A final intimation by Mont Kiser that the land deeded by Special Commissioner Damron to Nancy Kiser in the last general creditors' suit did not involve the 117 acres here in controversy is, as the lower court held, without merit. The recorded evidence vouches the correctness of this decision. Furthermore, Schofield admitted in his answer to Mont's original bill of partition in 1916 that the 117-acre tract bid in for him in the creditors' suit was the tract in controversy as Mont then contended.

It therefore follows that title to the surface of the 117 acres passed to Nancy Kiser, and upon her death intestate vested in her heirs at law.

The record is clear that Clinchfield acquired its title to the surface by two deeds, each conveying a one-fifth undivided interest, from two of Nancy Kiser's five children, namely: Pearl Kiser Worley and husband, and Vada Kiser, unmarried.

Neither is there merit in Mont Kiser's contention that the deed of December 12, 1891, from Schofield to James M. Kiser, was a mortgage and not an outright deed of con-

veyance. The evidence and the record do not establish any such claim. The deed is an absolute conveyance on its face and there is no convincing proof to the contrary.

Other minor errors assigned by appellants are without merit and need not be considered.

For the reasons stated the decree appealed from is

Affirmed.

APPENDIX B

OPINION OF JUDGE F. W. SMITH, JUNE 29, 1957.

On January 8, 1916, Mont B. Kiser, hereinafter called "Mont," filed his bill in chancery in this Court setting forth his alleged ownership of an undivided one-fourth interest in the surface of 117 acres of land. The Clinchfield Coal Corporation, hereinafter called "Clinchfield," and Schofield Kiser, hereinafter called "Schofield," were made defendants to the bill and each respectively filed their separate answer thereto. The answer of Clinchfield set forth its alleged title to the mineral estate in the 117 acres and also set forth its alleged title to an undivided two-fifths interest in the surface of the 117 acres and admitted Mont's title to a one-fourth interest in the surface as claimed by him. Schofield in his answer claimed title in fee simple to the entire 117 acres and filed his cross bill praying that the claims of Mont and Clinchfield, and the deeds under which they asserted their respective claims, be set aside as constituting a cloud upon Schofield's alleged title. To this cross bill Clinchfield filed its answer denying Schofield's claim and reasserted its alleged ownership of the mineral estate and its undivided two-fifths interest in the surface of said land and praying that the deed under which Schofield claimed be set aside as a cloud upon its title. Mont also filed his answer to Schofield's cross bill, in which he reasserted his alleged ownership of an undivided one-fourth interest in the surface and adopted Clinchfield's answer by the use of the following language:

page 2)

"That this respondent here adopts as his answer to said

cross bill; the answer of Clinchfield Coal Corporation, to said cross bill, which answer was filed on the 23rd day of April, 1917. This respondent here asks that each and all of the allegations and statements of the said answer *by* read and considered as a part of this answer, as freely as if said answer was here copied *in extenso.*"

The real issue in that proceeding, both as to the original bill and the cross bill, was between Mont and Clinchfield in agreement on one side and Schofield adversely as to Mont and Clinchfield on the other.

Thus the matter stood, after the taking of a number of depositions in support of the respective claims, until March 13, 1935, and before the case was submitted for decision, when the following order was entered:

"This cause came on, on this day to be heard, and on motion of the complainant, this cause is ordered to be left from the docket."

page 3) The motion on which this order was entered was made by Roland E. Chase, the attorney who at that time represented Mont. There is no claim made that this attorney lacked authority to act for Mont or that he represented any of the other parties.

On October 26, 1943, Schofield executed a deed purporting to convey to Mont (Mont being his son) and Mont's wife, Lula Kiser, the entire 117 acres in fee simple. In September, 1948, information that Schofield had executed this deed to Mont and also that Mont was preparing to mine the coal on the 117 acres came to Clinchfield, whereupon Clinchfield notified Mont not to mine the coal. On June 16, 1951, Mont and his wife executed a lease purport-

ing to lease the coal on and underlying the 117 acres to Winston Parrott and L. S. Monk, who proceeded to actively mine and remove the coal.

On October 26, 1951, Clinchfield filed its bill in chancery against Mont B. Kiser, Lula Kiser, Winston Parrott and L. S. Monk, alleging the facts aforesaid, reasserting its alleged title to the mineral estate in the entire 117 acres and its title to an undivided two-fifths interest in the surface thereof and praying that the cause which was removed from the docket by said decree of March 13, 1935, be restored upon the docket and praying that further proceedings be had therein to bring about a final decision of the issues presented in that suit and the additional issues arising from the additional and subsequent facts as alleged in the bill, and that the defendants be restrained from mining and removing the coal from said land and for judgment for the alleged trespass by the defendants in mining and removing same.

Clinchfield's bill, of October 26, 1951, is a bill in the nature of a bill of revivor. The court's order of March 13, 1935, was a dismissal of the case from the docket and stands on the same footing as a non suit and does not bar further action for the same cause. *Concrete Co.*
(page 4) v. *Board of Supervisors*, 197 Va. 821-826, 91 S. E. (2d) 415; *Payne* v. *Buena Vista Extract Co.*, 124 Va. 296, 98 S. E. 34; *Wilcher, et al.* v. *Robertson*, 78 Va. 602-618.

The issues in the original suit were never decided, and subsequent to its dismissal pertinent other facts have arisen which are now proper to be taken into consideration. In this situation, in order to get the cause again before the court and to bring in the subsequent facts, the bill is a com-

pound of a supplemental bill and a bill of revivor and is what is known as an original bill in the nature of a bill of revivor.

In 1 Hogg on Equity Procedure (Va. & W. Va.) (3d Edition), 273-6, it is said:

"In the absence of statutory provision authorizing some other mode, the only means of reviving a suit in equity are by bill of revivor, bill in the nature of a bill of revivor, and bill of revivor and supplement * * *

"The characteristic difference between a bill of revivor and a bill in the nature of a bill of revivor is that the former is used to revive where the abatement occurs by reason of death or operation of law, while the latter is used where the abatement occurs by the act of the parties. In the former case there is no other question to be determined than whether the new party sustains the character imputed to him, and if he does, the revivor is of course. But in the latter case there are other facts which may be brought into litigation, aside from the mere question of the character of the new party, and to such cases the simple bill of revivor does not technically apply. Under such circumstances, an original bill in the nature of a bill of revivor is the strictly proper remedy to put the proceedings again in motion and to enable the new party to have the benefit of the former proceedings * * *

"'A bill of revivor and supplement is a mere compound of a supplemental bill and a bill of revivor; and its separate parts must be framed and proceeded upon in the same manner. It not only continues a suit which has abated, but supplies any defects in the original bill arising from subsequent events. And whenever a complainant has a right to revive

a suit, he may add to the bill of revivor such supplemental matter as is proper to be added.'

"A bill of this character becomes proper where not only an abatement has taken place in a suit, but defects are to be supplied, or new events are to be stated, which have arisen since the commencement of the suit."

(page 5) It is proper, therefore, that the Court shall now consider and determine the issues presented in the original suit as well as the additional ones presented by Clinchfield's bill and the answer thereto of the defendants.

In 1884, the 117 acres, here in controversy, *was* a part of a larger tract then owned in fee simple by James M. Kiser, the father of Schofield Kiser, from whom came the common source of title claimed by all the parties in this controversy. By deed of January 31, 1884, James M. Kiser and wife conveyed the 117 acres by deed in fee simple to his son, Schofield, without any exception of the mineral. The deed was not filed for recordation until November 30, 1888. In the meantime, by deed of December 7, 1887, James M. Kiser and wife, together with certain of their children not involved in this controversy, conveyed the mineral estate, consisting of coal, oil, gas and other minerals and certain timber, on and underlying the 117 acres to Tazewell Coal & Iron Company, the latter being hereinafter called "Tazewell."

The evidence is sufficient to show that when the deed of 1884, conveying the 117 acres, from James M. Kiser to Schofield was executed, that Schofield held possession thereof until December 12, 1891, when he executed a deed for the 117 acres to James M. Kiser and wife, which contained

the following exception: "with the exception of the coal and mineral" and certain timber.

At the time of the conveyance of 1887 of the mineral estate by James M. Kiser to Tazewell, Schofield was in possession of the land, and under the common law rule, as set forth in *Chapman* v. *Chapman*, 91 Va. 397, his possession was sufficient to charge Tazewell with notice of Schofield's deed. Tazewell, therefore, must be held to have been a purchaser charged with notice of the said deed of 1884 from James M. Kiser to Schofield, even though the deed to Schofield was not recorded until after Tazewell's purchase of the mineral estate.

page 6) However, by statute approved by the General Assembly January 15, 1900, the common law rule in *Chapman* v. *Chapman* was abrogated by adding the proviso to the recording statute (Code of 1887, Sec. 2405), Acts of Assembly 1899-1900, page 89, to the effect that mere possession shall not be notice to subsequent purchasers for valuable consideration. *Norfolk, etc. Traction Co.* v. *White & Bros.*, 113 Va. 102, 73 S. E. 467. This proviso is the law in Virginia at the present time, as found in Sec. 55-96 of the Code of 1950 and was the law on August 7, 1902, when Tazewell Coal & Iron Company executed two deeds, one conveying to William Patrick an undivided three-fourths interest in the mineral estate, and another to L. C. Ware conveying an undivided one-fourth interest in the mineral estate, and thereafter by mesne deeds the mineral estate passed to Clinchfield, and at the time of all of these conveyances made since January 15, 1900, this proviso was in effect. Therefore, as to all purchasers of the mineral estate since the enactment of the statute abrogating the rule in *Chapman* v. *Chapman*, mere posses-

sion held by Schofield or Mont, since the effective date of the statute, did not constitute notice of Schofield's deed.

The evidence is clear that Clinchfield in good faith for valuable consideration has purchased the mineral estate embraced in the deed from James M. Kiser to Tazewell, relying upon said deed and the recorded chain of title by subsequent successive deeds from Tazewell and its successors in title down to Clinchfield's immediate grantors. If Clinchfield so purchased without notice of Schofield's deed, then Schofield's deed was and is void as to Clinchfield's deed of purchase.

The burden in this case is upon Clinchfield to prove that it was such a purchaser, which burden it has successfully borne. The burden is upon Schofield in his cross bill in the original proceeding and now upon Mont, since he has taken the position of Schofield, to prove that

(page 7) Clinchfield had notice of Schofield's deed prior to Clinchfield's purchase of the mineral estate.

Steinman v. *Clinchfield Coal Corp.*, 121 Va. 611, 96 S. E. 684.

Before Clinchfield can be charged with constructive notice of Schofield's deed, the deed must have been duly admitted to record, as required by the recording statute, which, as hereinbefore stated, is now Section 55-96 of the Code of 1950, which reads as follows:

"Every such contract in writing, and every deed conveying any such estate or term, and every deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels and every such bill of sale, or contract for the sale of goods and chattels, when the possession is allowed to

remain with the grantor, shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed or bill of sale may be, but the mere possession of real estate shall not of itself be notice to purchasers thereof for value of any interest or estate therein of the person in possession. A recordation under this section shall not affect the rights of a creditor acquired under Sec. 55-152."

Since the burden of proving notice is upon Mont, it follows that the burden is also upon him to prove that Schofield's deed was duly admitted to record prior to Clinchfield's purchase so as to constitute constructive notice or to prove that Clinchfield had actual notice.

Although Schofield's deed was filed for recordation and was actually copied in the deed book in the Clerk's Office of Dickenson County, there is no proof that the deed was ever acknowledged by the grantor, James M. Kiser, nor other proof of its execution by him, as required by Sections 2500 and 2501 of the Code of 1887 which was in effect at the time the deed was filed for recordation. These Sections read as follows:

"Except where it is otherwise provided, the court of any county or corporation (other than the city of Richmond) in which any writing is to be or may be recorded, and the chancery court of the city of Richmond, when any such writing is to be or may be recorded in the said city, or the clerk of any such court, in his office, shall admit to record any such writing as to any person, whose name
page 8) is signed thereto, when it shall have been acknowledged by him or proved by two witnesses

as to him in such court, or before such clerk in his office."

"Such court or clerk shall also admit any such writing to record as to any person whose name is signed thereto, upon a certificate of his acknowledgment before the said clerk, or a justice, a commissioner in chancery of a court of record, or a notary, within the United States, written on or annexed to the same, to the following effect, to-wit: 'County (or corporation) of , to-wit: I, , Clerk of court (or a justice of the peace or commissioner in chancery of the court, or notary public), for the county (or corporation) aforesaid, in the state (or territory or district) of , do certify that E. F., (or E. F. and G. H. &c.,) whose name (or names) is (or are) signed to the writing above, (or hereto annexed,) bearing date on the day of , has (or have) acknowledged the same before me, in my county (or corporation) aforesaid. Given under my hand, this day of .' Or upon the certificate of acknowledgment of such person before any commissioner appointed by the Governor, within the United States, so written or annexed, to the following effect, to-wit; 'State (or territory or district) of , to-wit: I, , a commissioner appointed by the Governor of the state of Virginia for the said state (or territory or district) of ; certify that E. F., (or E. F. and G. H., & c.,) whose name (or names) is (or are) signed to the writing above, (or hereto annexed), bearing date on the day of , has, (or have) acknowledged the same before me, in my state (or territory or district) aforesaid. Given under my hand, this day of , Anno Domini .' Or upon the certificate of the clerk of any county or corporation court in this state, or of the clerk of any court out of this state, and within the United States, that the said writing was acknowledged by such person, or proved as to him

by two witnesses before such clerk, or before the court of which he is a clerk, or upon certificate under the official seal of any minister plenipotentiary, charge d'affaires, consul general, consul, vice consul, or commercial agent appointed by the government of the United States to any foreign country, or of the proper officer of any court of such country, or of the mayor or the chief magistrate of any city, town, or corporation therein, that the said writing was acknowledged by such person, or proved as to him by two witnesses, before any person having such appointment, or before such court, mayor, or chief magistrate."

It will be seen that the law at that time under the foregoing sections (corresponding Sections 55-106 and 55-113 of the 1950 Code) require either a certificate of acknowledgment or a certificate of proof by two witnesses produced before the court or clerk as to any person whose name is signed thereto.

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It is argued by counsel for Mont that the fact that the clerk actually recorded the deed raises a presumption that it was duly acknowledged or proven before the clerk or court by two witnesses as to James M. Kiser. The act of the clerk in admitting the deed to record was not of a judicial nature but was merely ministerial. *Paul* v. *Baugh et al.*, 85 Va. 955, 9 S. E. 329. That being true, it does not raise any presumption that all the requirements of the law had been met as would have been the case if the recordation had been by order of court having proper jurisdiction to do so. The reasons for such a distinction are all too obvious to require further discussion.

The only certificate of acknowledgment, or any other proof of the execution of the deed by James M. Kiser, appears to be a certificate of Jessie Wampler, a Notary

Public, certifying the privy examination and acknowledgment of Elizabeth Kiser, the wife of James M. Kiser. The deed, therefore, was never duly admitted to record as to James M. Kiser. A valid acknowledgment or proof of execution is a prerequisite to the registration of an instrument and the recording of an unacknowledged or defectively acknowledged instrument is of no effect whatever in giving constructive notice of its contents to a subsequent purchaser. *Davis* v. *Beasley*, 75 Va. 491; *Raines* v. *Walker*, 77 Va. 92; *Nicholson* v. *Gloucester, etc.* 93 Va. 101, 24 S. E. 899; *Iron Belt Building, etc.* v. *Groves*, 96 Va. 138, 31 S. E. 23; *Helton* v. *Wood*, 101 Va. 54-58, 43 S. E. 186.

It is argued by counsel for the defendants that the attorney for Clinchfield who examined the title to the mineral estate prior to its purchase by Clinchfield must have had actual notice of Schofield's deed. There is no evidence that the attorney actually saw the deed or received
page 10) knowledge of its existence, and it cannot be presumed that he received actual notice, for such a presumption would have the effect of giving the recordation of an unacknowledged or defectively acknowledged instrument the same effect as a duly recorded and properly acknowledged instrument and would thus defeat the very purpose of the statute, put upon the complainant the burden of proof of notice and give effect to the recordation of an unacknowledged or defectively acknowledged instrument contrary to the well established rule to the contrary.

The mere fact that an unacknowledged deed appears of record will not shift the burden of proof as to notice to subsequent purchasers. In this case the burden of proof remains upon the defendants, and the fact that Schofield's unacknowledged deed appeared of record at the time of the

purchase of the mineral estate by Clinchfield is only a circumstance which may be taken into consideration by the Court or jury, as the case may be, in the ultimate determination of the question of whether or not the purchaser is chargeable with actual notice, but the fact that such an unacknowledged instrument has been recorded is not sufficient of itself to constitute either constructive or actual notice to subsequent purchasers.

It also appears that the deed from James M. Kiser to Schofield, under which the defendants claim, was not filed for record until after the conveyance of the coal and mineral by the deed from James M. Kiser to Tazewell. An attorney examining the records as to the title to the mineral estate would not be called upon nor expected to look for the recordation of adverse conveyances in the name of James M. Kiser subsequent to the date of the recordation of the duly acknowledged deed from James M. Kiser to Tazewell, in which such grantor parted with his legal title. The deed to Schofield was not recorded until four years and ten months after its execution and eleven months after the recordation of the deed to Tazewell. In making the examination of the records, the Clinchfield attorney (page 11) had the right to, and no doubt did, rely upon the record title, and he was called upon to report the title only as it appeared of record. The records showed nothing about Schofield's possession of the land at the time of the conveyance of the mineral estate to Tazewell. The subsequent recordation of a prior conveyance by James Kiser would not have been effective in giving constructive notice to Tazewell and, therefore, the attorney later examining the record title for Clinchfield would not have looked for adverse conveyances recorded later than the recordation of the deed to Tazewell. This further goes

to show that it would not be proper to presume that Clinchfield's attorney, in examining the title for Clinchfield, saw or should have seen Schofield's deed. So far as the records were concerned, Schofield's deed did not appear in Clinchfield's chain of title.

In *Bowman* v. *Holland*, 116 Va. 805, 83 S. E. 393, a case in which the facts were strikingly like the facts here, one Saunders, in 1905, conveyed a tract of land to Holland and therewith conveyed an easement over other lands which Saunders retained. Holland failed to have his deed recorded until 1908. In 1907, Saunders conveyed to Pugh a tract over which the easement ran without reserving or excepting the easement. However, Pugh had actual knowledge of the easement. In 1911, Pugh conveyed the tract, so conveyed to him, to Bowman without making reservation or exception of the easement. Holland contended that Bowman had constructive notice of the easement by reason of the recordation of Holland's deed in 1908. The Court held that Bowman took the land free of the easement, upon the ground that he was a purchaser for value, thus in effect holding that the recordation of Holland's deed prior to the execution of Bowman's deed did not impute knowledge to Bowman when the recordation was subsequent to the recordation of Pugh's deed. In the opinion the Court said:

"It would be of no avail to the appellees to prove notice, actual or constructive, as to Pugh, for no proposition of law is better settled than that a purchaser for
page 12) value without notice takes a good title from a purchaser for value with notice. See *Lacy* v. *Wilson*, 4 Munf. (18 Va.) 313; *Aragon Coffee Co.* v. *Rogers*, 105 Va. 51, 52 S. E. 843, 8 Ann. Cas. 623; *Yost* v. *Critcher*, 112 Va. 870, 72 S. E. 594.

"In *Claiborne* v. *Holland*, 88 Va. at p. 1049, 14 S. E. at p. 916, it is said: 'Nothing is better settled than that a purchaser without notice from a purchaser with notice is not affected by such notice.'"

The Court said further (116 Va. at p. 811):

"The deed to Pugh was the first of all the deeds from Cora E. Saunders and her husband to be recorded, and he took the land, therefore, unaffected by record notice, and the evidence fails to establish or bring home to Bowman notice that the land was subject to any easement or privilege in another person."

In *Providence &C. Club* v. *Gill*, 117 Va. 557, the court clearly recognized the principle that recordation of adverse conveyances which are not in the purchaser's chain of title do not charge the purchaser with notice of an adverse claim. The facts were that the Club in 1911 contracted in writing to sell Gill a part of its land. This contract was unrecorded. The following month the Club mortgaged its land, specifically excepting the tract contracted to Gill and in the description referring to that contract. The mortgage was promptly recorded. In 1912 the Club conveyed to Pollock the same land which it had contracted to Gill. Pollock was without actual notice of the Gill contract. Gill sued to enforce his contract, contending that Pollock had constructive notice of his contract because it was mentioned in the recorded mortgage. The court held that Pollock was a purchaser for value without notice and as such took good title, upon the ground that the deed of trust was not a link in Pollock's chain of title. The court said (117 Va. pp. 560-2):

"The established rule is that for a deed and its recitals to

operate as constructive notice to a *bona fide* purchaser of land it must be a link in the purchaser's chain of title. A purchaser is not chargeable with constructive notice of all matters of record, but only of such as the title deeds of the estate refer to, or put him on inquiry for. *Lewis* (page 13) v. *Barnhardt*, 145 U. S. 56, 12 Sup. Ct. 772, 36 L. Ed. 621; *Le Neve* v. *Le Neve*, 2 Lead Cas. in Eq. 189-190, et seq; *Meacham* v. *Blaess &c.*, 141 Mich. 258, 104 N. W. 579; *Pillow* v. *So. W. Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; *Flanary* v. *Kane*, 102 Va. 547, 46 S. E. 312, 681.

In *Claiborne* v. *Holland*, *supra*, 88 Va. at p. 1049, 14 S. E. at p. 916 it is said:

"Nothing is better settled than that a purchaser without notice from a purchaser with notice is not affected by such notice."

In Pomeroy on Equity Jurisprudence, 2nd Ed., Sec. 754 (71 L. Ed. p. 1272) the law is thus stated:

"If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtained a valid title and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice."

It will be seen, therefore, that it was not incumbent upon Clinchfield's attorney to search the record for adverse conveyances by James M. Kiser recorded after the recordation of the Tazewell Coal & Iron Company's deed and certainly

it cannot be presumed that he did so in order to make that presumption the basis for the further presumption that when he made such a search he in fact knew, or should have known, of the deed.

Clinchfield, therefore, being a *bona fide* purchaser for value without notice, the deed from James M. Kiser to Schofield Kiser, under which the defendant, Mont Kiser, claims is, therefore, void as to Clinchfield's purchase of the coal and minerals on the 117 acres. The deed from James M. Kiser to Tazewell, although not effective as between the immediate parties because the grantee was chargeable with notice of the prior conveyance to Schofield because of the possession held at that time by Schofield, is nevertheless effective so as to make good Clinchfield's title to the mineral estate.

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It is argued by counsel for the defendants that since Schofield's deed was good as against Tazewell by reason of Schofield's possession under the rule in *Chapman* v. *Chapman, supra*, that the enactment of the proviso abrogating the rule in that case could not effect Schofield's title which had already vested prior to its enactment. That is true as between Schofield and Tazewell, but the proviso was not retroactive as to one who purchased after its enactment. The statute making Schofield's deed void as to *bona fide* purchasers for valuable consideration without notice until and except from the time it was duly recorded, and to which the proviso was added, was in effect at the time of the execution of Schofield's deed. The proviso later enacted, provided only that:

"The possession of any such estate or term, without notice of other evidence of title, shall not be notice to said

subsequent purchasers for valuable consideration." Acts of Assembly 1899-1900, p. 89.

The defendants further claim that, even if Mont's paper title to the coal and mineral is not good as against Clinchfield, he has title by adverse possession by reason of Schofield's possession.

Schofield acquired no color of title to the 117 acres until he received his deed from James M. Kiser, January 31, 1884. It is argued that Richard Kiser, another son of James M. Kiser, had possession of the 117 acres prior to that time under a parole promise from his father, James M. Kiser, that he would give him the land. Richard Kiser, however, did not sign any deed to Schofield but signed the deed to Tazewell along with James M. Kiser for the mineral estate and thereby the rights of Richard Kiser by reason of any such parole promise and possession, if any, which could in any wise effect the title to the coal and minerals passed to Tazewell.

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The possession of Schofield can be considered adverse only from the time that he took possession under the deed from James M. Kiser, January 31, 1884, until December 12, 1891, the date when he conveyed the land, excepting the coal and mineral, back to James M. Kiser. Thereafter Schofield's possession of the surface could not be considered as being adverse to his own deed, in which he conveyed away all claim of title to the surface, unless he thereafter received some conveyance of title or color of title back to him. His mere occupancy of the land is not enough. He is not allowed to claim adversely to his own deed. There is no conveyance giving Schofield any color of title to the surface after his conveyance of 1891 to James M. Kiser, and thereafter his possession is presumed to be under his grantee's

title. His possession must be consistent with the title he purported to convey to his grantee. His possession is like that possession held by a grantor in a deed of trust, after the execution of which, is not adverse to the title of the trustee. *Creighs Heirs* v. *Henson*, 10 Gratt. 231; *Marbury* v. *Jones*, 112 Va. 389; *Duval* v. *Bibb*, (3) 7 Va. 362; *Schaubuck* v. *Dillemuth*, 108 Va. 86 60 S. E. 745, 15 Ann. Cas. 825.

Schofield's deed to James M. Kiser, in which he excepted the mineral estate, however, would not prevent his having color of title to the mineral estate which he excepted, even though the deed to him from James M. Kiser, under which he claims title, is void as to a *bona fide* purchaser for value without notice thereof. It is immaterial that the title paper relied upon as color of title is defective or even void as passing title. *Yellor Poplar Lbr. Co.* v. *Thompson's Heirs*, 108 Va. 612, 62 S. E. 358; *Blacksburg Mining Company* v. *Bell*, 125 Va. 565, 100 S. E. 806.

Color of title alone without possession, however, is not sufficient to acquire title by adverse possession. After a severance of the surface estate from the mineral estate, color of title to the mineral estate alone and possession of the surface estate not held adversely is also not sufficient. The deed from James M. Kiser to Tazewell effectively severed the title of the mineral estate from the surface estate as to any *bona fide* purchaser of the mineral estate for valuable consideration without notice of the prior deed from James M. Kiser to Schofield. Schofield's deed reconveying the surface to James M. Kiser was an effective severance of the two estates as to one who did not so purchase. The defendants have shown no occupancy or use of any part of the mineral

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estate such as would constitute actual possession. From the date of James M. Kiser's deed to Schofield purporting to convey to him the entire estate in the land, until the execution of Schofield's deed reconveying the surface back to James M. Kiser, the possession of the surface by Schofield extended to the coal and minerals also. The owner of land who is in possession thereof prior to a severance and who thereafter conveys the surface to another does not lose the continuity of his possession of the coal and minerals, for it is well established that the possession of the surface thereafter by his grantee is not adverse to the ownership of the coal, and in fact the authorities are almost unanimous in holding that such possession by the surface owner thereafter inures to the benefit of the owner of the mineral estate. The surface of land and of the underlying minerals may be severed, and when severed, the owners of the different estates are neither joint tenants nor tenants in common, for they are not owners of undivided interests in the same land, but of distinct and separate estates of entirely different natures, and the title to the freehold of one estate cannot be acquired by the adverse possession of the other. *Interstate Co.* v. *Clintwood Co.*, 105 Va. 574, 54 S. E. 593, 13 Mich. Jur. 89; 1 Am. Jur. 858, Adverse Possession, Sec. 119, and cases there cited.

In 58 C. J. S., page 329, the law is there stated as follows:

page 17) "At common law and under statutes in some jurisdictions, title and ownership of the surface of the land do not give or carry title or possession to the mineral estate thereunder which has been sold and severed from the surface, but the owner of the surface holds, or is presumed to hold, possession for the benefit of the owner

of the minerals, that is, as a quasi bailee or trustee for the mineral owner."

In the recent case of *Loncey Clevinger* v. *Bull Creek Coal Company, Inc.*, 199 Va. 216, the Court in following the common law as quoted from C. J. S. above said "some states have statutes to this effect which are but declaratory of the common law which we follow in the absence of statute."

It follows, therefore, that if one who receives a deed for land which conveys to him a good title as to all subsequent purchases with notice of his deed thereafter executes a deed conveying to another the surface and excepts the coal and minerals, he does not lose his continuity of possession of the coal and minerals as to such subsequent purchaser with notice.

On the other hand, however, if his title to the coal and mineral is such that it is void as to purchases for value without notice, then as against such purchaser he is not the owner of the mineral estate, and when he conveys away the surface, he has conveyed all the interest he had in the land and thereafter the possession of the surface by his grantee, or any person claiming under him, inures to the benefit of the true owner of the mineral estate and not to one who merely holds color of title thereto. In other words, the owner's title to the mineral estate is not lost by a conveyance of the surface and the possession thereof by the grantee, but no matter how long the grantee may hold such possession of the surface, if the title to the mineral estate is not good as against a *bona fide* purchaser for value without notice it cannot be gained adversely to such *bona fide* purchaser by reason of such possession of the surface by the grantee.

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As to Clinchfield, who was a *bona fide* purchaser of the mineral estate without notice of the prior deed from James M. Kiser to Schofield, the deed from James M. Kiser to Tazewell conveying the mineral estate was an effective severance and thereafter the possession of the surface by Schofield, or anyone claiming under him, was not adverse as to Clinchfield, who became the true owner of the mineral estate.

It, therefore, follows that Mont and his wife, under their deed from Schofield, acquired no more title than Schofield had, and the character of their possession is like that of Schofield's and is not sufficient to establish title in them by adverse possession.

The deeds exhibited by Clinchfield show that it has a good, recorded paper title to the mineral estate, which was conveyed by the deed of December 7, 1887, from James M. Kiser to Tazewell Coal & Iron Company, and that it has also exercised acts of exclusive ownership over the same. Clinchfield is, therefore, the owner of the mineral estate in the 117 acres in controversy in this suit.

With respect to the ownership of the surface estate, Schofield, as hereinbefore pointed out, reconveyed the surface to James M. Kiser by deed of December 12, 1891. Thus, the title to the surface was left in James M. Kiser.

In a general creditors suit of H. M. Jones against James M. Kiser and Schofield Kiser, all the land of
(page 19) James M. Kiser was sold by order of the Court by James T. Damron, Special Commissioner, except 109 acres known as the home tract. At the sale by James K. Damron, Special Commissioner, Schofield bid in the 117-acre tract but by reason of his failure to pay the

purchase price the Court ordered a resale thereof. This resale was ordered in a suit by James K. Damron, Special Commissioner, against Schofield Kiser, et al., and at the resale the land was bid in by John F. Trivett. The decree of the Court in that proceeding of June 15, 1902, shows that John F. Trivett assigned his bid to Schofield and directed Special Commissioner Damron to convey the 117 acres to Schofield and the cause was then stricken from the docket. However, on February 9, 1903, another decree was entered in the same cause as follows:

"This cause came on this day to be heard on the papers formerly read and upon the report of J. K. Damron Special Commissioner this day filed showing the payment in full of the purchase money to him from John F. Trivett as set out in report of said Damron, filed in this cause on the 26th day of September, 1900, and confirmed by decree entered herein on the 8th day of October 1900, and upon the assignment of John F. Trivett, of his bid in this cause to Schofield Kiser, and an assignment from Schofield Kiser to Nancy Kiser, and there being no exceptions to said report the same is hereby confirmed and the said J. K. Damron, who is appointed special commissioner for the purpose is hereby ordered and directed to convey to the said Nancy Kiser said tract of land by deed with covenants of special warranty and report to this court, and thereupon said Damron filed his report and said deed to said Nancy Kiser which said report and said deed is hereby approved and confirmed and the said deed is ordered to be delivered to the said Nancy Kiser by the clerk of this court upon the payment by the said Nancy Kiser of the sum of $5.50, to the said Commissioner Damron, for making and acknowledging

said deed, and there remaining nothing further to be done in this cause the same is ordered to be stricken from the docket."

Exhibit No. 10 is the original deed from J. K. Damron, Special Commissioner in the chancery cause of J. K. Damron, Special Commissioner, against Schofield Kiser, et al., to Nancy Kiser. It appears that the scrivener first wrote the deed to Schofield Kiser and later the name of Schofield was stricken out and Nancy written in its place

page 20) Counsel for the defendants contends that the deed could not have been changed so as to divest Schofield of his title. There are two good reasons why Schofield cannot successfully maintain this contention. In the first place, it does not appear that the deed was ever delivered to Schofield and accepted by him and, therefore, it is not shown that the title was ever vested in Schofield. The certificate of acknowledgment by J. K. Damron, Special Commissioner, is dated the 9th day of February, 1903, and the certificate of acknowledgment shows the date of the deed February 9, 1903, which is the date of the decree of the Court directing the deed to be made to Nancy Kiser. In the second place, the evidence shows without contradiction, and it is also asserted as a fact in the defendants' brief, that Schofield had the deed changed making Nancy Kiser the grantee, who was Schofield's wife, in order to avoid the collection of a fine against Schofield for illegal manufacture of whiskey. It is elementary that the principal of estoppel would apply to Schofield or anyone claiming by, through or under him. Mont, in as much as he claims title under Schofield, cannot now claim that the change in the deed was illegal. It, therefore,

follows that the title to the 117 acres passed to Nancy Kiser, and upon her death intestate vested in her heirs at law.

Clinchfield acquired its title to the surface by two deeds conveying an undivided one-fifth interest each from two daughters of Nancy Kiser, namely: Pearl Kiser Worley and husband and Vada Kiser, unmarried, they being two of her five children and heirs at law.

The defendants contend that the deed of December 12, 1891, from Schofield to James M. Kiser was a mortgage and not a deed. The evidence and the record do not bear out this contention. The deed is an absolute conveyance on its face and the evidence shows that it was not intended as a mortgage and the record of the position previously taken by Schofield contradicts any claim now made that the deed was a mortgage. However, any such contention now would appear to be immaterial, since both James M. Kiser and Schofield Kiser were parties defendant in the general creditors suit in which the land was sold.

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Another contention made by the defendants is that the deed from James K. Damron, Special Commissioner, to Nancy Kiser was not intended to convey, and did not convey, the 117-acre tract, but conveyed the 109 acres known as the home tract, which was not sold in the general creditors suit. A comparison of the description of the several deeds of conveyance made at the time of the general creditors suit shows clearly that Schofield and all other interested parties understood that the 117 acres bid in by John F. Trivett, who assigned his bid to Schofield and at Schofield's request, conveyed to Nancy Kiser by James K.

Damron, Special Commissioner, was the 117-acre tract here in controversy. Schofield in a deed of trust to Ira Vanover, Trustee, of March 14, 1903, conveyed his interest in another tract of 125 acres in about a month after the execution of the deed to Nancy Kiser, and in his description of the 125 acres, described it as "adjoining the lands of Campbell Kiser, Albert Breeding and Nancy Kiser," which description necessarily recognized Nancy Kiser as the owner of the 117-acre tract, since the 125 acres was bounded by Albert Breeding on the north and west and Campbell Kiser on the south and by the 117 acres on the east. The same description is contained in the foreclosure deed, in which the interest of Schofield in the

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125 acres was sold and conveyed by Ira Vanover, Trustee, to Mary Jane Hamon by deed of June 30, 1904. Schofield admitted in his answer to Mont's original bill that the 117 acres bid in by him at the sale in the general creditors suit was the 117 acres here in controversy. He admitted in his testimony that when this 117 acres was resold and was bid in by John F. Trivett, who assigned his bid to Schofield, he, himself, requested Commissioner Damron to make the deed of conveyance to his wife, Nancy Kiser, because "I got caught making whiskey and I knew I was worth over $1,700, and I had heard it said if a man was not worth $1,700 they could not collect the fine off of him." The contention now by Mont, claiming under Schofield, that the deed of February 9, 1903, from James K. Damron, Special Commissioner, to Nancy Kiser was not intended to convey the 117 acres here in controversy is without merit.

It is also apparent that Mont in the original proceeding in this cause claimed title only to an undivided one-fourth interest in the surface of the 117 acres here in controversy.

As hereinbefore pointed out, Schofield in his answer to Mont's original bill claimed title to the entire 117 acres. Clinchfield in its answer denied Schofield's title to any part of this tract and claimed title to the mineral estate and two-fifths interest in the surface, which answer Mont adopted in the language hereinbefore quoted. In other words, Mont's first position in this suit was that Clinchfield was right and Schofield was wrong. Now he undertakes to say that Schofield is right and Clinchfield is wrong. The fact that Mont has received a deed from Schofield for whatever interest Schofield had does not change the result nor cure the inconsistency so far as Clinchfield is concerned. The position now taken by Mont with respect to the surface is clearly inconsistent with his first position.

page 23) The rule is well established that a party will not be allowed to maintain inconsistent positions in the course of judicial proceedings not only in the same suit but also in proceedings supplemental thereto, including proceedings for review or retrial, or even separate suits or proceedings involving the same parties and questions.

In 19 Am. Jur. 704-8, title Estoppel, Sec. 72, the rule is stated as follows:

"§72. Inconsistent Positions in Legal Proceedings.—The rule that a party will not be allowed to maintain inconsistent positions is applied in respect to positions in judicial proceedings. As thus applied it may be regarded not strictly as a question of estoppel, but as a matter in the nature of a positive rule of procedure based on manifest justice and, to a greater or less degree, on considerations

of orderliness, regularity, and expedition in litigation. Certainly the elements of reliance and injury, while often considered, do not enter into such so-called estoppel to the same extent that they do in equitable estoppel * * *

"The doctrine of estoppel, by having assumed a certain position in a judicial proceeding, is to be distinguished from what is known as election of remedies. Both are bottomed upon estoppel, but an election of remedies upon a given state of facts is quite different from an estoppel growing out of the assertion at one time of a given state of facts and, when unsuccessful, an assertion at a subsequent time of another and entirely different and inconsistent state of facts * * *

"The rule against inconsistent positions applies generally to positions assumed not only in the course of the same action of proceeding, but also in proceeding supplemental thereto, including proceedings for review or retrial, and even in separate actions or proceedings involving the same parties and questions."

The decisions of the Virginia Supreme Court of Appeals accord fully with the foregoing statement of the rule:

In *Rohanna* v. *Vazzana*, 196 Va. 549, 84 S. E. (2d) 440, the defendant filed a special plea that plaintiffs
(page 24) were not licensed to do a contracting business and then withdrew the plea and agreed for a judgment to be entered. On appeal he attempted to assert the same defense as set up in the plea. The Court said (196 Va. at p. 553):

"A rule denying litigants the right to play fast and loose with courts should be maintained. The appellants had filed

their special pleas alleging the supposed illegal contract; the pleas had been withdrawn and the judgments entered as per the agreement made in open court. They should not now be heard to complain. The rule as here employed may not be strictly regarded as one of estoppel but rather in the nature of a positive rule of procedure based upon manifest justice and to a greater or lesser degree on considerations of orderliness, regularity and expedition in litigation. 19 Am. Jur., Estoppel, §72, pp. 704, 705, 706.

"Mr. Justice Spratley, in speaking for the court, in *Burch* v. *Grace Street Building Corp.*, 168 Va. 329, 340, 191 S. E. 672, had this to say:

"'In Virginia, we have also approved the general rule that a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory. A litigant is estopped from taking a position which is inconsistent with one previously assumed, either in the course of litigation for the same cause of action, or in dealings in pais.'

* * * * *

"'If the parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed: the coercive process of the law available only between those who consented to its exercise could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceedings is, therefore, required of all those who come or are brought before them.'" (168 Va., pp. 340, 341).

The defendant, Mont Kiser, therefore, will not be permitted to maintain his new and inconsistent position.

page 25) It is, therefore, the decision of the Court that the Clinchfield Coal Corporation is the owner of the mineral estate in the 117 acres which was conveyed by James M. Kiser to Tazewell Coal & Iron Company by deed of December 7, 1887, and that Clinchfield is also the owner of an undivided two-fifths interest in the surface and that Mont B. Kiser is the owner of an undivided one-fourth interest in the surface of the 117 acres; that the deed from James M. Kiser and wife to Schofield Kiser, of January 31, 1884, and the deed from Schofield Kiser to Mont Kiser and wife, of October 26, 1943, in so far as they purport to convey any estate or interest in the 117 acres inconsistent with the ruling of the Court, as expressed in this opinion, be set aside as constituting a cloud upon Clinchfield's title to the mineral estate, and its title to the undivided two-fifths interest in the surface and Mont Kiser's undivided one-fourth interest in the surface, as herein stated; that the defendants are guilty of mining and removing coal from said land and that Clinchfield is entitled to an injunction restraining the defendants from further mining or removing said coal or committing any further acts constituting an interference with the rights of Clinchfield Coal Corporation therein; and that the complainant, Clinchfield Coal Corporation, is entitled to judgment against the defendants for the coal which has been removed by them from said land and that this cause be referred to a Commissioner of this Court to ascertain the amount thereof.

Filed 10-2-57.

F. W. SMITH, Judge.

APPENDIX C

DECREE—CIRCUIT COURT OF DICKENSON COUNTY

October 4, 1957 (Record p. 17)

ON ORIGINAL BILL.

ON BILL OF REVIVOR.

DECREE.

This cause came on this day to be again heard upon all the pleadings, exhibits, depositions and other papers filed in the original suit styled Mont B. Kiser v. Clinchfield Coal Corporation, et al., and upon the bill in the nature of a bill of revivor filed herein by Clinchfield Coal Corporation against Mont B. Kiser, et al., the demurrer of the defendants thereto, the answer of the defendants, the depositions, exhibits and other papers filed herein, the briefs of counsel for the respective parties, and was argued by counsel. In consideration whereof it is hereby ADJUDGED, ORDERED and DECREED, for reasons stated by the Court in writing and hereby made a part of the record, as follows:

(1) The demurrer of the defendants to said bill in the nature of a bill of revivor is hereby overruled.

(2) The said suit styled Mont B. Kiser v. Clinchfield

Coal Corporation, et al., is hereby ordered reinstated upon the docket and the Court doth now consider
page 47) and determine the issues presented in said suit as well as the additional issues presented by said bill in the nature of a bill of revivor and the answer of the defendants thereto.

(3) Clinchfield Coal Corporation (whose present corporate name is The Pittston Company by reason of a certain corporate merger completed since the date of submission of this cause) is the owner of all the coal, minerals, metals, petroleum, metallic substances, fluids and gas of every description in, upon or underlying the 117-acre tract of land in the bill and proceedings mentioned, which is described in the deed from James M. Kiser and wife to Schofield Kiser, dated January 31, 1884, Clinchfield Coal Corporation is the owner of a two-fifths (2/5) undivided interest in and to the surface estate in said tract of land, having acquired said interest by deeds of conveyance from Nevada Kiser and Pearl Kiser Worley, two of the five heirs at law of Nancy Kiser, deceased (said heirs at law being Nevada Kiser, Pearl Kiser Worley, Mont B. Kiser, Nannie Bell Kiser and Vault Kiser, the last named having died intestate subsequent to said conveyances to Clinchfield Coal Corporation by Nevada Kiser and Pearl Kiser Worley), and said Nancy Kiser having acquired title to said surface estate by deed of February 9, 1903 (by error dated February 9, 1902) from J. K. Damron, Special Commissioner to said Nancy Kiser.

(4) The said deed from James M. Kiser and wife to Schofield Kiser, dated January 31, 1884, and the deed from Schofield Kiser to Mont B. Kiser and Lula Kiser, dated October 26, 1943, insofar as they are inconsistent with the

finding of the court hereinabove stated in paragraph numbered (3) of this decree, are hereby annulled and set aside as constituting a cloud upon the title of Clinchfield Coal Corporation to the said mineral estate in and to said 117-acre tract of land, and upon the titles of Clinchfield Coal Corporation and the present owners of said surface estate.

(5) The said deed from J. K. Damron, Special Commissioner, to Nancy Kiser, bearing the date of February 9, 1902, and of record in the Clerk's Office of this Court in Deed Book 20, page 264, was by mutual mistake of the parties thereto erroneously dated and should have been dated February 9, 1903, and that it was intended by all the parties to said deed at the time of the execution thereof that said deed convey the 117 acres of land in the bill and proceedings mentioned, which is described in the deed from James M. Kiser and wife to Schofield Kiser, dated January 31, 1884, and that said deed convey only the surface estate and not the said coal and mineral estate therein. The said deed is hereby reformed so that (a) it shall be dated February 9, 1902, (b) it shall describe the said 117-acre tract of land in the bill and proceedings mentioned, which is described in the deed from James M. Kiser and wife to Schofield Kiser, dated January 31, 1884, and (c) it shall except the said mineral estate therein. (page 48)

(6) The interlocutory injunction heretofore awarded herein to Clinchfield Coal Corporation enjoining and restraining the defendants Mont B. Kiser, Lula Kiser, Winston Parrott and L. S. Monk, and each of them, from conveying, leasing and sub-leasing, mining, removing or otherwise dealing with the coal in and upon the said 117-acre tract of land and from passing over, hauling over and

otherwise using and occupying the adjoining and adjacent lands of Clinchfield Coal Corporation, is hereby perpetuated.

(7) Clinchfield Coal Corporation is entitled to recover judgment against Mont B. Kiser, Lula Kiser, Winston Parrott and L. S. Monk for the amount of its damages resulting from the removal of coal by the said defendants from the said 117-acre tract. This cause is hereby referred to Pat B. Hale as Special Commissioner, who, after giving reasonable notice to the parties, shall take and receive such evidence as is offered by them, and shall thereupon ascertain and report to the Court the amount of the damages which Clinchfield Coal Corporation is entitled to recover from the said defendants for the coal removed by them, or any of them, from the said 117-acre tract of land, and the said Special Commissioner shall return to the Court, with his report, all the evidence taken and received by him.

page 49)

(8) Clinchfield Coal Corporation shall recover of the defendants its costs in this behalf expended.

To the action and decisions of the Court, as set forth in paragraphs No. (1), (2), (3), (4), (5), (6), (7) and (8) above and each of them, the defendants except.

F. W. SMITH, Judge.

APPENDIX D

ORDER GRANTING APPEAL

March 7, 1958 (Record 1)

IN THE
SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND.

Record No. 4863

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 7th day of March, 1958.

MONT B. KISER, ET AL., Appellants.

against.

CLINCHFIELD COAL CORPORATION, Appellee

From the Circuit Court of Dickenson County

Upon the petition of Mont B. Kiser, Lula Kiser, Winston Parrott and L. S. Monk an appeal is awarded them from a decree entered by the Circuit Court of Dickenson County on the 4th day of October, 1957, in a certain proceeding then therein depending wherein Clinchfield Coal Corporation was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said Circuit Court in the penalty of five hundred dollars with condition as the law directs.

APPENDIX E

DECREE—SUPREME COURT OF APPEALS OF VIRGINIA

VIRGINIA:

In the Supreme Court of Appeals held at the Court Library Building in the City of Richmond on Monday *the* 26th *day of* January, 1959.

Mont B. Kiser, Lula Kiser, Winston Parrott and L. S. Monk,

Appellants,

against Record No. 4863

Clinchfield Coal Corporation,

Appellee.

Upon an appeal from a decree entered by the Circuit Court of Dickenson County on the 4th day of October, 1957.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from. It is therefore adjudged, ordered and decreed that the same be, and it is hereby, affirmed, and that the appellants pay to the appellee thirty dollars damages, and also its costs by it expended about its defense herein.

Which is ordered to be certified to the said Circuit Court.

A Copy,

Teste:

Clerk.

APPENDIX F

DECREE REFUSING REHEARING

March 11, 1959

On mature consideration of the Petition of Mont B. Kiser, Lula Kiser, Winston Parrott and L. S. Monk, appellants, to set aside the decree entered herein, on the 26th day of January 1959, and grant a rehearing thereof, the prayer of the said petition is denied.

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 22 1959
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

October Term, 1958

No. [redacted] 106

MONT B. KISER, ET AL.,

Appellants,

v.

CLINCHFIELD COAL CORPORATION,

Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record for Appellee

THOS. C. PHILLIPS
188 East Main Street
Abingdon, Virginia
Of Counsel

In the

Supreme Court of the United States

October Term, 1958

No. .....

MONT B. KISER, ET AL.,

Appellants,

v.

CLINCHFIELD COAL CORPORATION,

Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL

May it please the Court:

The appellee hereby moves the Court to dismiss this appeal upon the grounds that (1) it does not present a substantial federal question; (2) the two alleged federal questions sought to be reviewed were not timely and properly raised and were not expressly passed upon; (3) the judgment rests upon an adequate non-federal basis.

1.

No Substantial Federal Question Is Presented

Appellants rested their claim of fee simple title to the 117-acre tract in question upon an unrecorded deed to Schofield Kiser made by James M. Kiser on January 31, 1884, or, alternatively, upon title by adverse possession on

the part of said Schofield Kiser. Both Virginia courts, by applying established principles of Virginia real property law to the facts as found by them, held against appellants on both points.

They held that appellee, claiming title to the mineral estate, was a bona fide purchaser thereof for value and without notice, and as such had good title thereto (J. S. 31, 43).* They found as a fact that appellee in 1907 purchased the mineral estate in a 1400-acre tract, including the 117-acre tract, in reliance upon a good recorded chain of title thereto, commencing with a deed made by said James M. Kiser, the common source, to Tazewell Coal and Iron Company on December 7, 1887 (J. S. 31, 33, 43).

With respect to appellants' claim of title by adverse possession, they found as a fact that Schofield's adverse possession of the surface ended in 1891 (J. S. 30, 41) (within the 10-year period necessary to ripen title—J. S. 5), and that he never held any "occupancy or use of any part of the mineral estate such as would constitute actual possession" (J. S. 33, 54-5). Both courts found as a fact that appellee "has exercised acts of exclusive ownership" of the mineral estate (J. S. 33, 57). The "acts of exclusive ownership" consisted of extensive coal mining operations conducted by appellee for a period of years on the James M. Kiser mineral tract, including the 117-acre tract (operations shown on Exhibit "Map B"). Appellants' allegations (J. S. 5, 6, 10, 11 *et seq.*) as to the length and character of Schofield's possession evidently will not bear comparison with the courts' findings of fact hereinbefore cited.

With respect to appellants' claim of title to the surface,

* Numerals in parenthesis with the letters "J. S." are page references to the Jurisdictional Statement.

both courts found as a fact that Schofield's adverse possession ended in 1891, as hereinbefore mentioned. This finding eliminated any area of applicability of the Virginia statute relative to title by adverse possession (J. S. 5). The courts decided that appellee holds good title to an undivided two-fifths (2/5) interest in the surface by recorded chain of title from James M. Kiser (J. S. 33, 35, 57, 60).

In 1887, under the rule in *Chapman* v. *Chapman*, 91 Va. 397, 21 S. E. 813, 50 A. S. R. 846, which was then Virginia case law, Schofield, by virtue of his possession then, had a good defense against Tazewell. Both Virginia courts so held (J. S. 30, 42). But in 1900 the Virginia statute defining constructive notice was amended (J. S. 3-4) so as to abrogate the rule in the *Chapman* case. Appellee, purchasing in 1907, after the abrogation, was held to have good title notwithstanding such possession of the surface as Schofield then had (by the curtesy).

Appellants somehow deem that the Virginia courts construed the 1900 amendment "retrospectively" so as to deprive appellants of "a vested property right" (J. S. 10). Obviously the statute was not applied retrospectively, but prospectively—not to *Tazewell's* purchase in 1887, but to *appellee's* in 1907. Appellants seem to suppose the contrary. But the Virginia court said: "Thus this proviso applied to all purchasers of the mineral estate *since the enactment of the statute* (emphasis supplied) abrogating the rule in the *Chapman* case, and mere possession by Schofield or Mont Kiser *since the effective date of the statute* (emphasis supplied) constituted no notice of Schofield's deed" (J. S. 31). The rule in the *Chapman* case evidently gave appellants no "vested right" to forbid the Virginia courts to apply *to a purchase made in 1907* the law then in effect and to consider the facts then existing.

Schofield had had ample opportunity to obtain a good record title during the period before innocent purchasers entered the situation, but he did not do so.

Neither Virginia court mentioned any federal question, and neither referred anywhere, directly or indirectly, to the Constitution of the United States or to any constitutional question.

2.

The Two Questions Sought To Be Reviewed Were Not Timely and Properly Raised and Were Not Expressly Passed Upon.

Appellants do not allege in their jurisdictional statement that in the trial court they raised either federal question in their pleadings (consisting of a demurrer and an answer of 16 pages). They allege that they contended in oral argument there that the statute "would be unconstitutional if applied as the court did" (J. S. 11), but do not claim to have referred in such argument to the Constitution of the United States. They allege that in a brief in the trial court they argued that the statute was "powerless to affect Schofield's rights which were vested and quoted from Mr. Justice Story's opinion while on Circuit" (J. S. 11), but again do not claim to have mentioned the Constitution of the United States. They allege that in their petition for appeal and in their brief in the Supreme Court of Appeals of Virginia they "reiterated the argument" (J. S. 11), but again they do not claim to have mentioned the Constitution of the United States.

These papers are not before this Court, none of them having been designated by appellants for certification as a part of the record here. However, in event the Court is of

opinion to consider appellants' allegations without record support that they raised the federal questions, then we, in that event, submit the following: We have examined the briefs and petition referred to, and find that (1) the argument referred to by appellants appears in the brief in the trial court on pages 41-44 of a 46-page brief, on pages 52-55 of a 63-page petition for appeal, and on pages 80-85 of a 92-page brief in the Supreme Court of Appeals, and is in identical language in all three papers; (2) nowhere in the argument is the Constitution of the United States mentioned or a "federal question" alleged, and only once is the word "Constitution" used, namely in the following passage:

"The best statement we have found of what retrospective laws are forbidden by the Constitution, is in the opinion of Mr. Justice Story while on Circuit in New Hampshire in the case of *Society, Etc.* v. *Wheeler*, 2 Gall. (U. S.) 139, Vol. 22, Fed. Cas. p. 756, Case No. 13156, where he said:

"'Every statute which takes away or impairs vested rights, acquired under existing laws, or creates new obligations, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.' See *McCracken* v. *Heywood*, 2 How. 608, 612"; (3) no federal authority other than in the above-quoted passage is referred to in the argument, although a number of Virginia decisions are cited; (4) nowhere in any of the papers referred to do we find any mention of or reference to appellants' supposed federal question numbered 2 (J. S. 5); (5) in appellants' above-mentioned brief in the Supreme Court of Appeals of Virginia on pages 2-4 under the heading "Assignments of Error", appears a list of nine assignments of alleged errors of the trial court, and on pages 4-6 of that brief under the heading "Questions Involved in This Appeal", appears a list of nine questions,

none of which, in either list, mention the Constitution of the United States, or either of the two questions here sought to be reviewed, or any alleged federal question.

Commenting now upon the above-mentioned results of our examination of these papers, we point out that appellants' argument as to "retrospective" construction and authorities there cited are equally as applicable to the Constitution of Virginia as to the Constitution of the United States, inasmuch as the Constitution of Virginia contains a due process of law clause (Art. 11: "no person shall be deprived of his property without due process of law . . .") and an impairment of the obligation of contracts clause (Art. 58: ". . . the General Assembly shall not pass . . . any law impairing the obligation of contracts . . ."). When, as here, the language raising the supposed federal constitutional question is equally apposite with respect to the state constitution, this Court has assumed that the question was raised under the state constitution and that no federal question was raised—". . . not as having reference to any repugnance to the Constitution of the United States." *Miller v. Cornwall R. Co.*, 168 U. S. 131, 18 S. Ct. 34, 35, 42 L. ed. 409.

With reference to the above-mentioned passage quoted by appellants from the *Society* case, it is evident that the passage would constitute pertinent authority in construing the Constitution of Virginia, even if Justice Story in the *Society* case was referring to the Constitution of the United States.

In further reference to appellants' supposed federal question No. 2, we point out that whereas by the notice of appeal appellants invoked the jurisdiction of this Court "pursuant to 2 (apparently intended for 28) U. S. C. Sec. 1257(2)",

yet question No. 2 is not within the ambit of that sub-section. Sub-section 2 does not confer jurisdiction by appeal in cases where, as in question No. 2, the validity of a State statute is *not* drawn in question "on the ground of its being repugnant to the Constitution . . . of the United States", and where as here, the State court did *not* pass upon the validity of such statute. Appellants, by their question No. 2, do not question the validity of the Virginia statute defining title by adverse possession (J. S. 5). As hereinabove pointed out, appellants did not anywhere raise in the Virginia courts any constitutional question with reference to this statute. The Virginia courts did not anywhere pass upon such constitutional question, and did not anywhere indicate that they considered such question.

Appellants further allege (J. S. 12) that "they made the same argument" on their question No. 1 in a petition for rehearing addressed to the Supreme Court of Appeals of Virginia, which was "refused without comment". Such petition for rehearing was not designated by appellants for certification as a part of the record here and is therefore not before the Court. If the allegations regarding the petition for rehearing are to be considered, this Court has held that it is too late to raise a federal question in a petition for rehearing. In *Herndon v. Georgia*, 295 U. S. 141, 55 S. Ct. 794, 59 L. ed. 1530, 1532, it was said: "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long established rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the Court actually entertains the question and decides it". Appellants admit that the Virginia court refused their petition "without comment".

Appellants further allege (J. S. 12): "Thus we have from the beginning insisted on the right secured them by the provisions of the Constitution of the United States . . ." Clearly, in view of the foregoing, this allegation is inaccurate.

Referring now to our ground that appellants' two questions were not expressly passed upon by the Virginia courts, we have pointed out hereinabove that these courts never anywhere considered the questions or recognized their existence, but based the decision wholly upon the real property laws of Virginia.

In view of the foregoing, we think it plainly appears that the two questions sought to be reviewed were not timely and properly raised and were not expressly passed upon.

3.

The Judgment Rests Upon an Adequate Non-Federal Basis

We pointed out hereinbefore under the first ground of this motion that both Virginia courts held that, under the real property laws of Virginia, appellee was a bona fide purchaser for value without notice and therefore had good title to the mineral estate of the 117-acre tract. The decision was based exclusively upon the facts found by the Virginia courts and the courts' application thereto of the Virginia real property laws. This provided an adequate non-federal basis for the decision.

RECEIPT OF JURISDICTIONAL STATEMENT

Appellants' Jurisdictional Statement served upon counsel for appellee was received on June 9, 1959.

WAIVER OF RIGHT TO FILE BRIEF

Appellee hereby waives its right to file a brief in support of this motion.

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